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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Appln. No.	: 10/680,602	Confirmation No. 5764
Applicant	: Olin Palmer et al.	
Filed	: October 6, 2003	
Title	: INTRAVASCULAR DEVICE	
Art Unit	: 3734	
Examiner	: Truong, Kevin Thao	
Docket No.:	: ACS-65628 (G2929USD1)	Los Angeles, California
Customer No.	: 24201	January 11, 2008

MAIL STOP APPEAL BRIEF-PATENTS

Commissioner for Patents

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Alexandria, VA 22313-1450

**PRE-APPEAL BRIEF REQUEST FOR REVIEW**

**INTRODUCTION**

The present invention is directed towards devices for removing undesired material or objects and maintaining or restoring patency of blood vessels or other luminal spaces. The devices of the present invention include structure that is linked or embodies a monolithic framework of thin struts which are radially expandable.

The invention is intended to provide a structure that has the capacity to engage and retain naturally occurring or foreign bodies while having a minimal profile that can traverse easily and repeatably through a standard catheter across tortuous anatomy. The device embodies superior flexibility to be deployed and retrieved consistently across difficult anatomy while being able to retain captured material.

The devices include an elongate member (i.e. a wire) and a body attached to the elongate member. The structure of the body can be made in a number of different ways. The bodies, i.e. baskets or cages, expand from a collapsed position to an expanded position to allow the body to engage and retain naturally occurring or foreign bodies in a body vessel. In one aspect, the body includes a structure which absorbs or modifies forces applied to the device when the elongate

member is being manipulated by an operator. In other aspects, the devices of the present invention are contemplated for use as protection devices which are deployed in the region of a repair site during the performance of an interventional procedure. Such protection devices can include a filtering membrane portion intended to facilitate the capture of debris created during the interventional procedure.

In other aspects of the invention, the structure of the body is defined by specific numbers of ribs members which interconnect specific numbers of ring members to create distinct baskets or cages. The particular arrangements of rib members and ring members create distinct bodies. The body can have a proximal end portion, a midsection, and distal end portion. Additional elements which form portions of the body can be associated with the body portion of the device

#### NOTICE OF APPEAL

A Notice of Appeal from the Office Action of September 11, 2007 is being filed concurrently herewith along with the appropriate fee.

#### ISSUES ON APPEAL

At issue is whether claims 1, 6 and 13-28 were incorrectly rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 6,013,093 to Nott et al. (the "Nott patent").

At issue is whether claim 1 was incorrectly rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 4,347,846 to Dormia (the "Dormia patent").

A copy of the pending claims is attached hereto as Exhibit A. A copy of the drawings is attached hereto as Exhibit B. A copy of the Office Action dated September 11, 2007 is attached hereto as Exhibit C. A copy of the Nott patent is attached as Exhibit D. A copy of the Dormia patent is attached as Exhibit E.

#### ARGUMENT

Claims 1, 6 and 13-28 were rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 6,013,093 to Nott et al. (the "Nott patent"). Appellant respectfully submits that the Examiner has misinterpreted the disclosure of the Nott patent. Claim 1 is directed to an intravascular device for use in a body lumen comprising an elongate member having a first end portion and a second end portion, the first end portion configured to extend exterior of the body lumen; and a body attached to the second end portion of the elongate member, the body being

configured for deployment within the body lumen and including a substructure that absorbs forces applied to the body of the elongate member. The body has a proximal portion, a midsection and a distal portion with the proximal portion being attached to the elongate member. Applicants note that the Nott patent does not disclose a body (filter 10) attached to an elongate member as recited in claims 1, 6, 10, 11 and 19-23. The structure identified by the Examiner as the elongate member in the Nott patent is merely a pusher 134 which is not attached to the filter 10 (body), but rather, remains in an abutting relationship with the filter (10). The Examiner takes the position that the Nott device, when given its broadest reasonable interpretation, shows the body (10) attached to the elongated member (134). The Examiner relies on Figure 5 and col. 7, lines 54-66 of the Nott patent to support this position. However, Appellant believes that the Examiner's interpretation of the word "attached" is not reasonable and goes well beyond this word's normal meaning. In the Nott patent, this pusher 134 is used to advance the filter 10 through a sheath 132 to the desired location in the body vessel. Then, the filter 10 is released within the vessel as is shown in FIG. 5A. The sheath and pusher can then be withdrawn from the patient (see Col. 7, line 54 to Col. 8, line 2 of the Nott patent). This abutting arrangement of pusher (134) with the filter (10) does not constitute an "attached" arrangement as the word "attached" is normally construed. Moreover, the specification discloses the arrangement of elongate member and body as being fixed to each other. Certainly, no one would dispute that the elongate member (134) disclosed in the Nott patent is not attached to the filter (10) once the filter (10) is deployed in the vessel as is clearly shown in Figure 5A. Accordingly, the notion that the elongated member (134) of the Nott device is somehow "attached" to the filter (10) is incorrect.

Accordingly, the filter 10 of the Nott patent cannot possibly be attached to, or diverge from, or extend distally from, the elongate member, as recited in the claims, since the pusher 134 must separate from the filter 10 in order to implant the filter 10 as shown in FIG. 5A. For at least this reason alone, the Nott patent fails to disclose the basic structure recited in the pending claims.

Claims 13, 19 and 24 also requires specific structural elements to be combined to create the body of the device. Claim 13 requires the body portion to be defined by a pair of rib members extending distally from the elongate member. Each rib member branches into a pair of distal ring members. Appellant notes that the Examiner has reproduced figures 5 and 5A from the Nott patent on page 3 of the Office Action. The Examiner places boxes next to these figures with

particular elements called out in the claims. However, the Examiner provides no lines or arrows pointing directly to the structure which the Examiner claims corresponds to the elements of the claims. One is left guessing as to which structure the Examiner is identifying. Accordingly, Appellant submits that the Examiner has failed to present a prima facie case of anticipation based on these figures appearing in the Office Action. Moreover, claim 13 requires the pair of ribs to extend distally from the elongate member. However, even assuming *arguendo* that the filter (10) extends distally from the elongate member, the proximal end of the filter (10) appears to be made from a continuous ring member, not a pair of ribs as required in claim 13. This is yet another reason why the Nott patent fails to anticipate claim 13.

Claims 19 and 24 further require particular structure which cooperates to create the body of the embolic protection device. For example, claim 19 requires two pairs of rib members, each rib member defining a first ring which is connected by a plurality of links to a second ring defined by distal ring members. Again, Appellant submits that the Examiner has not identified the structure in the Nott device which corresponds to these elements and as such has failed to present a prima facie case of anticipation based on the Nott patent. Additionally, claim 24 requires four ribs diverging from the elongate member, each rib branching into a pair of ring members. Each pair of ring members in turn converges to define a link and a pair of second ring members extends distally from each link. Again, Appellant submits that in the Office Action the Examiner has failed to present a prima facie showing of anticipation of the Nott patent with respect to claim 24 as well.

Appellant notes that other elements recited in the claims are lacking in the Nott patent. For example, as noted above with respect the claim 1, the Examiner has notably failed to identify any structure in the Nott device that constitutes the "substructure that absorbs forces applied to the body" which are additionally recited in claims 18, 23 and 28. The Nott patent also fails to disclose the use of a filter membrane as recited in claims 14, 20 and 25. For at least these additional reasons, the Nott patent fails to anticipate the pending claims.

Claim 1 was rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 4,347,846 to Dormia (the "Dormia patent"). The Examiner states the following regarding the Dormia patent at page 4, paragraph 3 of the Office Action dated September 11, 2007;

Dormia discloses substantially as claimed in figures 103, an elongated member (2, 3) having a first end portion configured to extend exterior of the body lumen; a body (8) attached to the second end portion of the elongate member (2, 3) and wherein the body (8) includes proximal and distal portion and midsection.

Appellant notes that while the Examiner later states that the Dormia patent includes a "substructure that absorbs forces applied to the body" as recited in claim 1, the Examiner has failed to identify any structure in the Dormia patent that constitutes this element. Appellant submits that the filter device disclosed in the Dormia patent lacks such a structure and that the Examiner has failed to provide a prima facie rejection of claim 1 based on the Dormia patent.

In summation, the Nott patent fails to disclose the basic elements recited in the pending claims and does not anticipate claims 1, 6 and 13-28. The Dormia patent also fails to disclose a basic element recited in claim 1. Accordingly, all of the pending claims have been incorrectly rejected by the Examiner.

The Notice of Appeal filing fee of \$510 is being paid by credit card with this electronic transmission. The Commissioner is hereby authorized, however, to charge any additional fees which may be required, or credit any overpayment, to Deposit Account No. 06-2425.

Respectfully submitted,  
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